Government of Malaysia v Gan Chuan Lian and another action

HIGH COURT (MALACCA) — CIVIL SUIT NOS 21-1-1987 AND 21-24-1987
MOHAMED NOOR J
10 FEBRUARY 1992

Revenue Law *— Income tax — Additional assessments — Whether assessments were statute-barred — Whether assessments could be made after lapse of 12 years — Whether Director General had burden to prove fraud, wilful default or negligence — Income Tax Act 1967 s 91(1) & (3)*

The plaintiff issued notices of additional assessments of income tax in 1985 and 1986 for the years 1967 to 1973 and served them on the defendant. The defendant failed to pay the additional assessments within the stipulated periods. In January 1987, the plaintiff filed a writ claiming from the defendant in respect of the additional assessments. The statement of claim did not raise fraud, wilful default or negligence on the defendant's part. The plaintiff applied for and was granted summary judgment by the senior assistant registrar. The defendant appealed to the High Court.

Held, allowing the appeal:

(1) Under s 91(1) and (3) of the Income Tax Act 1967, the Director General of Inland Revenue may make an assessment for any year of assessment where there has been fraud, wilful default or negligence on the taxpayer's part. The burden to show that fraud, wilful default or negligence has been committed is on the Director General. If the Director General fails to discharge this burden, he cannot legally make an additional assessment after a lapse of 12 years. In this restrictive sense, limitation exists.

(2) Since the plaintiff did not plead fraud, wilful default or negligence in the statement of claim, the plaintiff could not therefore raise them in its affidavit to support its application for summary judgment. This was because the plaintiff was bound by its pleadings.

(3) The defendant had accordingly raised a triable issue as to whether the plaintiff's claim was statute-barred on the grounds that the additional assessments were made after a lapse of 12 years and that neither fraud, wilful default nor negligence on the defendant's part was pleaded by the plaintiff.

[Bahasa Malaysia summary

Plaintif telah mengeluarkan notis taksiran tambahan cukai pendapatan pada 1985 dan 1986 untuk tahun 1967 hingga 1973 dan telah menyampaikannya kepada defendan. Defendan gagal membayar taksiran tambahan dalam masa yang dinyatakan. Pada Januari 1987, plaintif memfailkan satu writ menuntut daripada defendan berkenaan dengan taksiran tambahan itu. Pernyataan tuntutan itu tidak menimbulkan

fraud, keingkaran sengaja atau kecuaian pada behagian defendan. Plaintif telah memohon dan mendapati penghakiman terus daripada penolong kanan pendaftar. Defendan merayu kepada Mahkamah Tinggi.

Diputuskan, membenarkan rayuan itu:

(1) Di bawah s 91(1) dan (3) Akta Cukai Pendapatan 1967, Ketua Pengarah Hasil Dalam Negeri boleh membuat taksiran untuk sebarang tahun taksiran di mana telah berlaku fraud, keingkaran sengaja atau kecuaian pada bahagian pembayar cukai. Beban untuk menunjukkan bahawa fraud, keingkaran sengaja atau kecuaian telah berlaku adalah atas Ketua Pengarah. Jika Ketua Pengarah gagal melepaskan bebannya itu, dia tidak boleh dari segi undang-undang membuat satu taksiran tambahan selepas selang 12 tahun. Dalam erti yang menyekat begini, had masa wujud.

(2) Oleh kerana plaintif tidak membuat pliding fraud, keingkaran sengaja atau kecuaian dalam pernyataan tuntutan, plaintif tidak boleh kerana itu menimbulkan perkara tersebut dalam afidavitnya untuk menyokong permohonannya untuk penghakiman terus. Ini adalah kerana plaintif terikat oleh plidingnya.

(3) Defendan oleh sebab itu telah menimbulkan isu yang boleh dibicarakan sama ada tuntutan plaintif dihalang oleh statut atas alasan bahawa taksiran tambahan itu telah dibuat selepas selang 12 tahun dan bahawa fraud, keingkaran sengaja atau kecuaian pada bahagian defendan tidak dijadikan pliding oleh plaintif.]

Cases referred to

1 *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473 (folld)
2 *Sun Man Tobacco Ltd v Government of Malaysia* [1973] 2 MLJ 163 (distd)
3 *NTS Arumugam Pillai v Government of Malaysia* [1976] 2 MLJ 72 (distd)
4 *ABC v The Comptroller of Income Tax, Singapore* [1959] MLJ 162 (distd)
5 *Lin Securities (Pte) v Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, Third Party)* [1989] 1 MLJ 321 (folld)
6 *Government of Malaysia v Ng Song Choon* [1975] 1 MLJ 131 (folld)

Legislation referred to

Income Tax Act 1967 ss 91(1), (3), 103(1), (4), (5), (5A)
Rules of the High Court 1980 O 14

Badariah bte Hassan (Senior Federal Counsel, Jabatan Hasil Dalam Negeri) for the plaintiff.
KK Chong (Koh Kim Leng & Co) for the defendant.

Mohamed Noor J: This is an appeal against an order of the senior assistant registrar granting leave to the plaintiff to enter summary judgment for the amount claimed against the defendant. The plaintiff issued notices of

A additional assessments in 1985 and 1986 for the years 1967 to 1973 and the notices were duly served on the defendant. As the defendant failed to pay within the stipulated periods, penalties were imposed thereon and the final claim was for $416,689.68 after deducting the payment of $105,000 made by the defendant. In January 1987 the plaintiff filed a writ against the defendant claiming this sum and this was duly served on the defendant on
B 26 January 1987. The defendant entered appearance on 28 January 1987 and on 7 March 1987 filed his statement of defence. In his defence the defendant raised the defence of limitation, that is to say, the additional assessments made after a lapse of 12 years were statute-barred. On 18 August 1987, the plaintiff applied by summons-in-chambers under O 14
C for leave to sign final judgment. In opposing the application, the defendant contended that (i) as the additional assessments were made after a lapse of 12 years and as neither fraud, wilful default nor negligence on the part of the defendant was pleaded in the statement of claim, the claim was statute-barred, and (ii) the plaintiff was not entitled to summary judgment in the case involving fraud and therefore, as triable issues had been raised, he was
D entitled to defend. However, the senior assistant registrar, after hearing and obviously relying on the Supreme Court case of *Chong Woo Yit v Government of Malaysia*,[1] granted the plaintiff's application. The defendant appealed to this court.

In this case, the plaintiff exercised its powers under s 91(1) and (3) of the
E Income Tax Act 1967 ('the Act') which read:

> (1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within twelve years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount of additional amount of chargeable income and tax or
> F in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.
> (3) The Director General where it appears to him that —
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> (a) any form of fraud or wilfil default has been committed by or on behalf
> G of any person; or
> (b) any person has been negligent,
>
> in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

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My understanding of s 91(1) is that where assessments were made within 12 years after the expiration of any year of assessment the Director General according to his best judgment can make the assessment. And under s 91(3) he may at any time make an assessment in respect of a taxpayer for any year of assessment where it appears to him that there has been any form
I of fraud or wilful default or negligence on the part of that person. Here, the defendant raised limitation as a defence and it was necessary for the court to decide whether there was a triable issue.

It is settled law that where the taxes become payable under s 103(1) of the Act the court shall not entertain any plea that the amount of tax sought

to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4), (5) or (5A). See *Sun Man Tobacco Co Ltd v Government of Malaysia*[2] and *NTS Arumugam Pillai v Government of Malaysia*.[3] In the case of *ABC v The Comptroller of Income Tax, Singapore*[4] it was even held that the validity of the notices of assessment and additional assessment was immaterial in determining the objections by the taxpayer. In this case, the issue is entirely different from those raised in the ordinary course of events. Here the defendant was resisting leave to sign final judgment for the tax for the period from 1967 to 1973 on the ground that they are statute-barred.

With regard to limitation, in *Chong Woo Yit v Government of Malaysia*,[1] in agreeing with the judgment in *NTS Arumugam Pillai v Government of Malaysia*,[3] this is what Gunn Chit Tuan SCJ said:

> We would agree that by virtue of the proviso to s 33(1) of the Limitation Act 1953, limitation does not apply to the commencement of any proceeding by the government for the recovery of any tax or interest thereon, *although for the purpose of an assessment or additional assessment of tax under s 91 of the Income Tax Act 1967 not made in any year of assessment or within 12 years after its expiration, the Revenue would still have to show that fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment.* (Emphasis added.)

Although in that case the Supreme Court dismissed the taxpayer's appeal on the ground that there were no triable issues, it is manifestly clear from that citation that the Supreme Court recognized the burden on the part of the Revenue to show that fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment for the purposes of an assessment or additional assessment of tax under s 91 of the Act not made in any year of assessment or within 12 years after its expiration. Therefore, it follows that if the Revenue fails to discharge that burden it cannot legally make the additional assessment after a lapse of 12 years. To my mind, in that restrictive sense, limitation can be said to exist. In *NTS Arumugam Pillai v Government of Malaysia*,[3] Gill CJ (Malaya) (as he then was) said:

> It was contended for the appellant that there was no allegation of wilful default in the affidavit in support of the plaintiff's application under O 14. But the fact that additional assessments were made for the years of assessment 1953 and 1958 was sufficient to indicate such default.

In my view, the then Federal Court also acknowledged the fact that one of the said three elements must exist to enable the Revenue to legally make the additional assessment after a lapse of 12 years, except that the method of proof was different, that is to say, in that case wilful default was presumed.

On the facts of the present case, the question that arises now is when will the Revenue have to discharge that burden and how? To my mind, that will be at the stage of O 14 application and by raising the elements of fraud, wilful default or negligence in conformity with the pleadings. As none of these elements have been pleaded by the plaintiff in the statement of claim the question is whether they can now be raised in the affidavit supporting the O 14 application. To my mind, the plaintiff cannot do so now because as the application by the plaintiff is for final judgment, to allow the plaintiff

A to do so would be repugnant to the principle of pleadings which dictates that parties are bound by their pleadings. I am of the view that the plaintiff is not in the same position as the defendant, where VC George J said in *Lin Securities (Pte) v Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, Third Party)*:[5]

B > No doubt a defendant is bound by the four corners of his pleading at the trial of the action but he is not so bound at the O 14 proceedings. Order 14 r 4(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise. He is entitled to show at the hearing of the O 14 application that over and above what has been pleaded in the statement of defence he has other defences. The issue at an O 14 application is whether the
C > defendant has a defence and not whether the statement of defence provides him with a defence.

I am in complete agreement with what was said by the late Arulanandom J in *Government of Malaysia v Ng Song Choon*:[6]

D > Limitation is a good defence plea in law and no court can adjudicate on it without a trial and without having the facts proved. When the plea that a claim is statute-barred is raised in court it precludes any question of legality, correctness or rights. All it means is that no claim for the enforcement of that right can be entertained by the courts and no relief can be given by the courts. To give a simple example there may be a lawful debt due by the defendant to the plaintiff but if the claim is made after the period of limitation the court will not grant
E > relief. The question of merits does not arise. In this case the plaintiff relies on s 91(3) for the legality and validity of its assessments but s 91(3) only gives the Director General a right to impose tax for any year of assessment where it appears to him that (a) any form of fraud or wilful default has been committed by or on behalf of any person; or (b) any person has been negligent. As this is a penal law it must be construed strictly and therefore the courts can only pro-
F > nounce judgment on the claim if the claim is supported by allegations of fraud or wilful default or negligence. It is true that it is not for the Director General to disclose any of these things to the taxpayer when he makes the assessment but if he seeks to obtain judgment of the court the court must be satisfied that there was fraud or wilful default or negligence on the part of the taxpayer before it can decide whether the assessment was barred by limitation. It is essentially a legal
G > issue and it falls outside the scope of s 106(3) which only lays down that the courts shall not entertain any plea for the amount of tax to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5). In this case no such plea is being raised before the court and therefore in strictly construing the section the court should not extend it to mean no plea shall be entertained by the court. Although this may be a tax case as was
H > stated earlier one cannot read more into the Act than what is expressly and unambiguously stated. The taxpayer, the defendant in this case, is not precluded from raising the plea that the claim is statute-barred and until and unless the court is satisfied that the Director General exercised his powers correctly when making the assessment under s 91(3) the court cannot possibly adjudicate.

I For the aforesaid reasons, as the defendant has raised a triable issue on limitation, the appeal is allowed with cost.

Appeal allowed.

Reported by Wong Kian Kheong